

**United States District Court**

For the Northern District of California

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28**E-FILED on 10/12/06**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ISMART INTERNATIONAL LIMITED,

Plaintiff,

v.

I-DOCSECURE, LLC, a California Limited Liability Company; E-NETSECURE SERVICES, INC., a California Corporation; INTEGRITY DATA APPLICATIONS CONSULTING, LLC, a California Limited Liability Company; ISMART SECURE, LLC, a Delaware Limited Liability Company; JOSEPH BAGGIO, an individual; JONATHAN BALZORA, an individual,

Defendants.

No. C 04-03114 RMW

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY

**[Re Docket Nos. 221, 238, 246]**

Plaintiff iSmart International, Ltd. ("iSmart") moves to disqualify attorneys from the law firm of Paul, Hastings, Janofsky & Walker LLP as counsel for defendants I-Docsecure LLC; E-Netsecure Services, Inc.; iSmart Secure LLC; and Joseph Baggio. After the hearing on this motion, the court instructed the parties to file supplemental declarations on certain subjects, which the parties have done. For the reasons set forth below, the court denies plaintiff's motion to disqualify.

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY—No. C 04-03114 RMW  
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## I. BACKGROUND

Plaintiff filed its initial complaint in July 2004, alleging failure of a joint enterprise between itself, I-DocSecure, LLC ("I-Doc"), E-NetSecure Services, Inc. ("E-Net"), and also naming as defendants Integrity Data Applications Consulting, LLC, Joseph Baggio, and Jonathan Balzora, and, eventually, iSmart Secure, LLC. The parties have changed counsel several times. On March 25, 2006, defendants I-Doc, E-Net, Secure, and Baggio ("defendants," for the purposes of this order) switched counsel from James Hughes and Robert Sullwold to Michael Edelman of Dechert LLP. Edelman left Dechert shortly thereafter and became associated with Paul, Hastings, Janofsky & Walker LLP on June 1, 2006. Edelman Decl. ¶ 2. The defendants elected to follow Edelman to Paul Hastings. *Id.*

In early 2006, a group of Paul Hastings attorneys led by David Blumenfeld represented "Zoom Developers Pte Ltd." in connection with the acquisition of real estate in Shanghai, China. Blumenfeld Decl. ¶ 2. Prakash Kirpalani was Blumenfeld's primary contact at Zoom Developers. *See id.* ¶¶ 3, 4, 11. The scope of this representation is purportedly contained in an engagement letter which has not been provided to the court. *See* Blumenfeld Supp. Decl. ¶ 2; *see also* Edelman Supp. Decl. ¶ 9. According to R. K. Bhuta, "the Vice President of Project Finance for Zoom Developers Pvt Ltd India," attorneys of Paul Hastings "represent the Zoom Group of Companies in an ongoing business transaction." Bhuta Decl. ¶¶ 1, 3. Bhuta's last meeting with Blumenfeld was in mid-May, 2006. Bhuta Supp. Decl. ¶ 8; Blumenfeld Supp. Decl. ¶ 4. Blumenfeld's understanding is that the purpose of this meeting was to introduce Paul Hastings attorneys to officials of a "third-party financial institution" so that the institution could possibly retain Paul Hastings attorneys to represent it in connection with Zoom Developer's Shanghai real estate acquisition. Blumenfeld Supp. Decl. ¶ 4.

Blumenfeld states that Paul Hastings has billed Zoom no time since the middle of March 2006, though Blumenfeld has subsequently attended meetings related to the representation "as a business development activity." Blumenfeld Decl. ¶ 6. He also asserts that Paul Hastings attorneys "completed all work described in the engagement letter in March, 2006," Blumenfeld Supp. Decl. ¶ 3, and that he has "instructed our accounting department to return to the client the

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1 small balance on account" left over from Zoom's retainer. Blumenfeld Decl. ¶ 4. (When  
 2 Blumenfeld instructed the accounting department to do this is not indicated.) Blumenfeld also  
 3 states that Zoom Developers has not requested that Paul Hastings attorneys perform further work  
 4 and that no such work has been performed. Blumenfeld Supp. Decl. ¶ 3. Bhuta states that he  
 5 intends to use Paul Hastings attorneys over the next several years if the Chinese government  
 6 approves the Shanghai project. Bhuta Supp. Decl. ¶ 8.

7 The parties dispute the degree of relatedness (and even the precise relationship) between  
 8 iSmart and Zoom. iSmart is an Indian business entity. Its website describes it as "a group  
 9 company of Zoom Enterprises." Coddon Decl., Ex. B; *see also* Edelman Decl., Ex. C at 1. The  
 10 website lists "Y.P. Sahni," "D.N. Bakhai," and "Vijay Choudhary" as iSmart's board, and "Pradeep  
 11 Saxena" and "Sujit Poddar" as advisors. *Id.* Zoom Developers is likewise an Indian business  
 12 entity. Edelman Decl., Ex. C at 3. The "Management" section of Zoom Developers' website<sup>1</sup> lists  
 13 the board of directors of a Zoom entity<sup>2</sup> as "Vijay Choudhary," "B.L. Kejriwal," "D. N. Bakhai,"  
 14 "Yashpal Sahni," and "Pradeep Saxena." According to Bhuta, there is overlap between the  
 15 ownership of Zoom Developers and iSmart: "61% of the shares of iSmart are held by the same  
 16 shareholders who are holding 99.99% of Zoom" Developers.<sup>3</sup> Bhuta Suppl. Decl. ¶ 2.

17 Zoom Developers' website lists both Zoom Developers and iSmart as "Group Companies  
 18 of Zoom Enterprises." Edelman Decl., Ex. C at 1. According to Bhuta, "'Zoom Enterprises' and  
 19 the 'Zoom Group of Companies' are fictitious names that refer to a group of companies hwo share

20 <sup>1</sup> <http://www.zoomdevelopers.com/management.htm> (last visited September 25, 2006).

21 <sup>2</sup> According to Edelman, even though the domain of this site is zoomdevelopers.com, the  
 22 management section lists the officers of Zoom Enterprises. Edelman Supp. Decl. ¶ 6, Ex. F.  
 23 However, Bhuta describes Zoom Enterprises as a "fictitious name." Bhuta Suppl. Decl. ¶ 3. For  
 24 the purposes of this motion, the court takes the list to be the board of Zoom Developers.

25 <sup>3</sup> For the purposes of this motion, the court will assume this statement to be true, as it is more recent  
 26 and more detailed than other conflicting assertions. For example, iSmart has claimed that it is a  
 27 wholly-owned subsidiary of Zoom Developers. *See, e.g.*, Kouri Decl., Ex. B. at 1. In  
 28 counterclaims filed on February 25, 2006, the defendants alleged that Vijay "Choudhary is, and at  
 all relevant times herein was, the owner and controlling executive of various business interests,  
 including being the Director of Zoom Developers PVT Ltd., the parent company of the wholly  
 owned subsidiary, iSmart International." Countercl. (docket no. 81) ¶ 7. In answering the  
 counterclaim, iSmart admitted "Choudhary is the owner and executive officer of various business  
 interests, and is a director of Zoom Developers Pvt. Ltd." but denied that iSmart "is a wholly  
 owned subsidiary of Zoom Developers Pvt. Ltd." Answer to Countercl. (docket no. 85) ¶ 7.

1 the same or virtually the same ownership, corporate governance and operational management."

2 Bhuta Suppl. Decl. ¶ 3. This grouping includes iSmart and Zoom Developers. *Id.* Zoom

3 Developers and iSmart are supported by common "secretarial, legal and financial consultancy"

4 services. Bhuta Supp. Decl. ¶ 6. Projects initiated in one company of Zoom Enterprises may be

5 transferred to another as the project develops. *Id.* ¶ 8. The Shanghai real estate matter in which

6 Blumenfeld represented Zoom Developers may at a later date be transferred to another company

7 of Zoom Enterprises, including iSmart. *Id.* ¶ 9.

8 The defendants have requested iSmart produce documents relating to Zoom Developer's

9 "profits after tax of \$7.08 million," "gross income of \$37.27 million," and "net worth of \$36.90

10 million." Edelman Decl., Ex. D at 11-13. In its responses to these requests for production, iSmart

11 claims that it does not control Zoom Developers and generally does not have the documents that

12 would be responsive to the defendants' requests. *Id.* at 12-13.

13 There is no evidence that Paul Hastings attorneys have acquired from Zoom any particular

14 confidential information relevant to the action before this court, though iSmart claims that they

15 did. Compare Blumenfeld Decl. ¶¶ 9-10 with Bhuta Decl. ¶ 4. Research performed by attorneys

16 in Paul Hastings' conflicts department did not reveal any relationship between iSmart and Zoom

17 Developers. Coddon Decl. ¶ 3.

## 18 II. ANALYSIS

19 This court uses California state law to resolve questions regarding the permissibility of

20 representation. *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.*, 809 F. Supp. 1383, 1387 (N.D.

21 Cal. 1992) (Orrick, J.). If material facts are in dispute, disqualification is at the discretion of the

22 trial court. *Cal West Nurseries v. Superior Court*, 129 Cal. App. 4th 1170, 1174 (2005).

23 Otherwise, the issue is purely one of law. See *City of San Francisco v. Cobra Solutions*, 38 Cal.

24 4th 839, 845 (June 5, 2006). The California Supreme Court has explained that when deciding

25 whether to disqualify an attorney, "[t]he paramount concern must be to preserve public trust in the

26 scrupulous administration of justice and the integrity of the bar." *Id.* "When disqualification is

27 sought because of an attorney's successive representation of clients with adverse interests, the trial

28 court must balance the current client's right to the counsel of its choosing against the former

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1 client's right to ensure that its confidential information will not be divulged or used by its former  
 2 counsel." *Id.*

3 "Two types of situations give rise to conflicts disqualifying counsel: concurrent  
 4 representation and successive representation. The rules governing such conflicts differ." *Cal*  
 5 *West*, 129 Cal. App. 4th at 1174. Conflicting, concurrent representation is generally forbidden;  
 6 this result is compelled by an attorney's duty of loyalty. *Id.* at 1175. Whether successive  
 7 representation for and then against an entity is permissible depends on "(1) the relationship  
 8 between the legal problem involved in the former representation and the legal problem involved in  
 9 the current representation, and (2) the relationship between the attorney and the former client with  
 10 respect to the legal problem involved in the former representation." *Id.* at 1174. As the California  
 11 Supreme Court recently explained,

12 To determine whether there is a substantial relationship between successive  
 13 representations, a court must first determine whether the attorney had a direct  
 14 professional relationship with the former client in which the attorney personally  
 15 provided legal advice and services on a legal issue that is closely related to the legal  
 16 issue in the present representation. If the former representation involved such a  
 17 direct relationship with the client, the former client need not prove that the attorney  
 18 possesses actual confidential information. Instead, the attorney is presumed to  
 19 possess confidential information if the subject of the prior representation put the  
 attorney in a position in which confidences material to the current representation  
 would normally have been imparted to counsel. When the attorney's contact with  
 the prior client was not direct, then the court examines both the attorney's  
 relationship to the prior client and the relationship between the prior and the present  
 representation. If the subjects of the prior representation are such as to make it  
 likely the attorney acquired confidential information that is relevant and material to  
 the present representation, then the two representations are substantially related.

20 *Cobra Solutions*, 38 Cal. 4th at 847 (citations and quotation marks omitted). Successive  
 21 representation is governed by the "duty of confidentiality." *Cal West*, 129 Cal. App. 4th at 1174.

22 The State Bar of California has opined that an attorney may simultaneously represent "a  
 23 large, publicly-held corporation" and act adversely to its wholly-owned subsidiary where there is  
 24 no chance the corporate parent will be involved in the action against the subsidiary. Formal  
 25 Opinion No. 1989-113, available at 1989 WL 253261 at \*1. The State Bar noted that "[w]hen a  
 26 corporation is the alter ego of another entity or has a sufficient unity of interests, they should be  
 27 treated as the same entity for conflict purposes." *Id.* at \*5. Considerations relevant to this inquiry  
 28 are "the separateness of the entities involved, whether corporate formalities are observed, the

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1 extent to which each entity has distinct and independent managements and board[s] of directors,  
 2 and whether, for legal purposes, one entity could be considered the alter ego of the other," as well  
 3 as "the percentage of ownership of stock" and whether the entities are "closely-held or family  
 4 corporation[s]." *Id.* at \*5 and n.2.<sup>4</sup>

5 The California Court of Appeal, in *Morrison Knudsen Corp. v. Hancock, Rothert &*  
 6 *Bunshoft*, discussed three factors to consider when determining whether related corporate entities  
 7 should be considered as a single unit for the purposes of representational conflicts: (1) whether the  
 8 attorney received "confidential information" from one entity "substantially related to the present  
 9 claim against" the other; (2) whether control of the two entities' legal affairs overlap; (3) whether  
 10 the two entities have overlaps in other areas, such as operations, personnel, or insurance coverage.  
 11 69 Cal. App. 4th 223, 245-48 (1999). The court considered the first factor the most important. *Id.*  
 12 at 245. As part of the third factor, the court considered the likelihood that the two clients would  
 13 become adverse during the litigation. *Id.* at 247. The court expressly rejected the holding from  
 14 *Brooklyn Navy Yard Cogeneration Partners v. Superior Court*, 60 Cal. App. 4th 248 (1997), that  
 15 only the alter ego test could be used to determine whether clients were the same for conflicts  
 16 analysis. *Morrison Knudsen*, 69 Cal. App. 4th at 249-52; see also *Certain Underwriters at Lloyd's*  
 17 *London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 914, 921 n.3 (N.D. Cal. 2003) (Chen, M.J.). The  
 18 *Morrison Knudsen* court summarized that "the principal focus should be the practical  
 19 consequences of the attorney's relationship with the corporate family. If that relationship may  
 20 give the attorney a significant practical advantage in a case against an affiliate, then the attorney  
 21 can be disqualified from taking the case." 69 Cal. App. 4th at 253.

22 First, the court must resolve whether iSmart and Zoom Developers are to be treated as  
 23 separate entities for conflicts purposes. The first factor from *Morrison Knudsen* does not appear to  
 24 be present here. iSmart has presented no evidence that Blumefeld's representation of Zoom  
 25 Developers gave any Paul Hastings attorney access to any confidential information that would be  
 26 material in this action. There is also no evidence of the second factor. The evidence merely

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27 <sup>4</sup> The State Bar opinion is "advisory only" and "not binding on the courts." 1989 WL 253261 at  
 28 \*6. California courts, though, have relied on it for guidance. See, e.g., *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223, 240-44 (1999).

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1 suggests that Bhuta handles legal affairs for Zoom Developers; his counterpart, if any, at iSmart is  
 2 undisclosed. The third factor weighs heavily in iSmart's favor, though. The evidence indicates the  
 3 five principals each for Zoom Developers and iSmart are the same in four instances (Bakhai,  
 4 Choudhary, Saxena, and Sahni) and that there is overlap of lower-level employees.

5 This does not appear to be the situation contemplated by the State Bar opinion. iSmart and  
 6 Zoom Developers do not appear to be publicly-traded; rather, they appear to be closely held.  
 7 There is substantial overlap between the boards of directors of the two (Choudhary, Bakhai, and  
 8 Sahni). iSmart is not owned by Zoom Developers; rather, there is substantial overlap between the  
 9 two groups of undisclosed owners of each company. Since it is a close call, the court will look to  
 10 the guidance in *Morrison Knudsen* to consider any "significant practical advantage" the potentially  
 11 conflicting representation may give the attorney facing disqualification. The facts before the court  
 12 do not indicate that Edelman and his associates would gain any practical advantage in this  
 13 litigation involving a joint enterprise gone wrong if they knew information Zoom Developers  
 14 disclosed to Blumenfeld and his associates in the course of acquiring real estate in Shanghai. The  
 15 court will therefore consider iSmart and Zoom Developers separate entities for the purpose of this  
 16 motion to disqualify.<sup>5</sup> Accordingly, there are no grounds for disqualifying any Paul Hastings  
 17 attorney.

### 18                   **III. ORDER**

19                  For the foregoing reasons, the court denies plaintiff's motion to disqualify any Paul  
 20 Hastings attorney from representing defendants I-Doc, E-Net, Secure, and Baggio.

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23 DATED: 10/12/06

  
 24 RONALD M. WHYTE  
 United States District Judge

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28 <sup>5</sup> This court does not intend the findings in this order to apply outside of the ruling on the motion to  
 disqualify.

1 | Notice of this document has been electronically sent to:

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registered for e-filing under the court's CM/ECF program.

Dated: 10/12/06

/s/ JH  
**Chambers of Judge Whyte**